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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/756,188	01/12/2004	Brian P. Brockway	22570-032001	2296
26194 7590 10/09/2008 FISH & RICHARDSON P.C. P.O. BOX 1022 MINNEAPOLIS, MN 55440-1022				
EXAMINER SCHAETZLE, KENNEDY				
ART UNIT 3766		PAPER NUMBER		
NOTIFICATION DATE 10/09/2008		DELIVERY MODE ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATDOCTC@fr.com

Interview Summary

Application No.

10/756,188

Applicant(s)

BROCKWAY ET AL.

Examiner

Kennedy J. Schaetzle

Art Unit

3766

All participants (applicant, applicant's representative, PTO personnel):

(1) Kennedy J. Schaetzle.

(3) _____.

(2) Kurt Krenz (62,664).

(4) _____.

Date of Interview: 10 September 2008.

Type: a) ☒ Telephonic b) ☐ Video Conference

c) ☐ Personal (copy given to: 1) ☐ applicant 2) ☐ applicant's representative)

Exhibit shown or demonstration conducted: d) ☐ Yes e) ☒ No.

If Yes, brief description: _____.

Claim(s) discussed: 30-32.

Identification of prior art discussed: N/A.

Agreement with respect to the claims f) ☐ was reached. g) ☒ was not reached. h) ☐ N/A.

Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: See Continuation Sheet.

(A fuller description, if necessary, and a copy of the amendments which the examiner agreed would render the claims allowable, if available, must be attached. Also, where no copy of the amendments that would render the claims allowable is available, a summary thereof must be attached.)

THE FORMAL WRITTEN REPLY TO THE LAST OFFICE ACTION MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW. (See MPEP Section 713.04). If a reply to the last Office action has already been filed, APPLICANT IS GIVEN A NON-EXTENDABLE PERIOD OF THE LONGER OF ONE MONTH OR THIRTY DAYS FROM THIS INTERVIEW DATE, OR THE MAILING DATE OF THIS INTERVIEW SUMMARY FORM, WHICHEVER IS LATER, TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW. See Summary of Record of Interview requirements on reverse side or on attached sheet.

/Kennedy J. Schaetzle/
Primary Examiner, Art Unit 3766

Summary of Record of Interview Requirements

Manual of Patent Examining Procedure (MPEP), Section 713.04, Substance of Interview Must be Made of Record

A complete written statement as to the substance of any face-to-face, video conference, or telephone interview with regard to an application must be made of record in the application whether or not an agreement with the examiner was reached at the interview.

Title 37 Code of Federal Regulations (CFR) § 1.133 Interviews Paragraph (b)

In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not remove the necessity for reply to Office action as specified in §§ 1.111, 1.135, (35 U.S.C. 132)

37 CFR §1.2 Business to be transacted in writing.

All business with the Patent or Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

The action of the Patent and Trademark Office cannot be based exclusively on the written record in the Office if that record is itself incomplete through the failure to record the substance of interviews.

It is the responsibility of the applicant or the attorney or agent to make the substance of an interview of record in the application file, unless the examiner indicates he or she will do so. It is the examiner's responsibility to see that such a record is made and to correct material inaccuracies which bear directly on the question of patentability.

Examiners must complete an Interview Summary Form for each interview held where a matter of substance has been discussed during the interview by checking the appropriate boxes and filling in the blanks. Discussions regarding only procedural matters, directed solely to restriction requirements for which interview recordation is otherwise provided for in Section 812.01 of the Manual of Patent Examining Procedure, or pointing out typographical errors or unreadable script in Office actions or the like, are excluded from the interview recordation procedures below. Where the substance of an interview is completely recorded in an Examiners Amendment, no separate Interview Summary Record is required.

The Interview Summary Form shall be given an appropriate Paper No., placed in the right hand portion of the file, and listed on the "Contents" section of the file wrapper. In a personal interview, a duplicate of the Form is given to the applicant (or attorney or agent) at the conclusion of the interview. In the case of a telephone or video-conference interview, the copy is mailed to the applicant's correspondence address either with or prior to the next official communication. If additional correspondence from the examiner is not likely before an allowance or if other circumstances dictate, the Form should be mailed promptly after the interview rather than with the next official communication.

The Form provides for recordation of the following information:

- Application Number (Series Code and Serial Number)
- Name of applicant
- Name of examiner
- Date of interview
- Type of interview (telephonic, video-conference, or personal)
- Name of participant(s) (applicant, attorney or agent, examiner, other PTO personnel, etc.)
- An indication whether or not an exhibit was shown or a demonstration conducted
- An identification of the specific prior art discussed
- An indication whether an agreement was reached and if so, a description of the general nature of the agreement (may be by attachment of a copy of amendments or claims agreed as being allowable). Note: Agreement as to allowability is tentative and does not restrict further action by the examiner to the contrary.
- The signature of the examiner who conducted the interview (if Form is not an attachment to a signed Office action)

It is desirable that the examiner orally remind the applicant of his or her obligation to record the substance of the interview of each case. It should be noted, however, that the Interview Summary Form will not normally be considered a complete and proper recordation of the interview unless it includes, or is supplemented by the applicant or the examiner to include, all of the applicable items required below concerning the substance of the interview.

A complete and proper recordation of the substance of any interview should include at least the following applicable items:

- 1) A brief description of the nature of any exhibit shown or any demonstration conducted,
- 2) an identification of the claims discussed,
- 3) an identification of the specific prior art discussed,
- 4) an identification of the principal proposed amendments of a substantive nature discussed, unless these are already described on the Interview Summary Form completed by the Examiner,
- 5) a brief identification of the general thrust of the principal arguments presented to the examiner,
(The identification of arguments need not be lengthy or elaborate. A verbatim or highly detailed description of the arguments is not required. The identification of the arguments is sufficient if the general nature or thrust of the principal arguments made to the examiner can be understood in the context of the application file. Of course, the applicant may desire to emphasize and fully describe those arguments which he or she feels were or might be persuasive to the examiner.)
- 6) a general indication of any other pertinent matters discussed, and
- 7) if appropriate, the general results or outcome of the interview unless already described in the Interview Summary Form completed by the examiner.

Examiners are expected to carefully review the applicant's record of the substance of an interview. If the record is not complete and accurate, the examiner will give the applicant an extendable one month time period to correct the record.

Examiner to Check for Accuracy

If the claims are allowable for other reasons of record, the examiner should send a letter setting forth the examiner's version of the statement attributed to him or her. If the record is complete and accurate, the examiner should place the indication, "Interview Record OK" on the paper recording the substance of the interview along with the date and the examiner's initials.

Continuation of Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: Attorney argued that the first action final after RCE was inappropriate. Attorney stated that all new claims were submitted and therefore the same invention was not being claimed. Examiner stated that all the claims were directed to the same invention and could have been properly finally rejected on the grounds and art of record in the next Office Action if they had been entered prior to the RCE submission. The examiner also stated that there was no denial of entry of any amendment after the 4/19/07 final. The examiner elaborated that in his opinion "same invention" does not mean "identical invention" and that the claims were directed to the same invention because the same patentably indistinct method was being claimed and that if the claims prior to the RCE were presented along with the new claims, the examiner could not restrict because they are neither independent nor patentably distinct. The examiner suggested applicant file a response as if a non-final had been given, and argue the validity of the final. Examiner also stated that he would be willing to enter any amendment after final if the amendment put the case in condition for allowance, or suggest and enter allowable subject matter if discovered when deciding on the case. Attorney stated that the client would most likely not find such course of action acceptable. In a subsequent voicemail on Sunday Sept. 28, 2008, attorney stated that restriction practice was not appropriate to apply to define "same invention" and that the standard of double patenting should apply. Attorney also stated that the final was not appropriate because the rejection of claims 31 and 32 were not explained by the examiner as required in MPEP 706 and thus the issues for appeal were not clear. Attorney stated they would proceed on this matter because the 3 month date was up on Monday the 29th of September. Examiner informed applicant in a subsequent voicemail that the MPEP did not define "same invention" in the context of after final rejections. "Same invention," for example, is also defined in the MPEP (2301.03) to mean patentably indistinct inventions. Examiner stated that the determination of "same invention" must therefore be made on a case-by-case basis and informed the applicant that they may consider the option of petitioning the validity of the final for a second opinion. Examiner also stated that the limitations of claims 31 and 32 were clearly and explicitly shown in the base reference (see abstract, Fig. 1, col. 5, lines 9-29, etc.) to the extent that those of ordinary skill in the art would instantly recognize their presence, thus causing no confusion for appeal. MPEP 706 (37 CFR 1.104(c)(2)) does not require the examiner to explain that which is already readily apparent.